Supreme Court, U.S.
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No. 93-1079

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

MITCHELL LEE PRICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DREW S. DAYS, III
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QUESTION PRESENTED

Whether petitioner has a right under the Due Process Clause to collaterally attack four prior state convictions used to enhance his sentence under the Sentencing Guidelines.

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UNITED STATES OF AMERICA, PETITIONER

v.

MITCHELL LEE PRICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum decision of the court of appeals (App., *infra*, 1a-3a) is unpublished, but the judgment is noted at 999 F.2d 545 (Table). The order of the district court denying respondent's motion to exclude his prior convictions (App., *infra*, 4a-6a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1993. A petition for rehearing was denied on October 7, 1993. App., *infra*, 7a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND SENTENCING GUIDELINE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

Sentencing Guidelines § 4A1.2, Application Note 6 (Nov. 1, 1990), provides as follows:

> *Reversed, Vacated, or Invalidated Convictions.* Sentences resulting from convictions that have been reversed or vacated because of errors of law, or because of subsequently-discovered evidence exonerating the defendant, are not to be counted. Also, sentences resulting from convictions that a defendant shows to have been previously ruled constitutionally invalid are not to be counted. Nonetheless, the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 (Adequacy of Criminal History Category).

Sentencing Guidelines § 4A1.2, Commentary (Nov. 1, 1990), provides as follows:

> *Background*: Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.
>
> The Commission leaves for court determination the issue of whether a defendant may collaterally attack at sentencing a prior conviction.

STATEMENT

Respondent pleaded guilty in the United States District Court for the Eastern District of California to armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d). He was

sentenced to 236 months in prison, to be followed by five years of supervised release. The court of appeals vacated the sentence and remanded the case for resentencing. App., *infra*, 1a-3a.

1. On December 10, 1990, respondent robbed a bank in Bakersfield, California. He demanded money from a teller while displaying the handle of a gun, the rest of which was concealed beneath his jacket. Respondent then fled from the bank with $247 in cash. Minutes later, police officers spotted respondent in his car. The officers gave chase. While trying to elude them, respondent crashed into a chain-link fence. He fled on foot, discarding a shoulder holster in the process. Respondent then ran to a shed in a residential neighborhood. He surrendered approximately one hour later. A search of respondent's car disclosed a .44 caliber pistol. Gov't Substitute C.A. Br. 4-5; Presentence Report (PSR) 2-3.

2. The presentence report indicated that respondent had four prior California state court convictions for violent felonies: a 1981 conviction for assault with a deadly weapon and three 1984 convictions for residential burglary. Based on those convictions, the probation officer recommended that respondent be sentenced as a "career offender" under Sentencing Guidelines § 4B1.1 (Nov. 1, 1990).[1] PSR 5, 9, 11-12.

Respondent objected to the use of his four prior convictions for purposes of sentencing him under the Guidelines. With respect to his 1981 assault conviction, respondent argued that his guilty plea was invalid because he had not been advised of the "direct consequences" of his guilty plea and the court had not found a factual basis for it. C.A. Excerpts

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[1] Sentencing Guidelines § 4B1.1 provides that a defendant is a career offender if "(1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense."

of Record 34-36.[2] He also contended that the three burglary convictions from 1984 could not be used for sentencing because the minute order in those consolidated cases failed to indicate whether the court had advised him of his constitutional rights in connection with his guilty pleas, and no other record existed. *Id.* at 36-37.

The district court noted the Sentencing Guidelines then in effect provided that "sentences resulting from convictions that a defendant shows *to have been previously ruled* constitutionally invalid are not to be counted" in determining an appropriate sentence under the Guidelines. Guidelines § 4A1.2, Application Note 6 (Nov. 1, 1990) (emphasis added). See App., *infra*, 5a. The court also noted that the background commentary to Section 4A1.2 "leaves for court determination the issue of whether a defendant may collaterally attack at sentencing a prior conviction." See App., *infra*, 5a-6a. The court thus held that the decision whether to permit a collateral attack on a previous conviction was committed to its discretion, and that it would not permit respondent to mount such an attack on his prior convictions in this case. *Id.* at 6. On July 15, 1991, the district court sentenced respondent to 236 months in prison as a career offender under the Guidelines.

3. The court of appeals vacated the sentence and remanded the case for resentencing. App., *infra*, 1a-3a. Rely-

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[2] Respondent did not dispute that he had been advised of his right to a jury trial, his right to remain silent, his right to cross-examine adverse witnesses, and the right to call witnesses in his defense. See C.A. Excerpts of Record 34. See also *id.* at 54-55. The transcript of respondent's 1981 plea proceeding, moreover, shows that the state court advised him that he faced a maximum prison term of one year, that parole revocation proceedings would not be pursued, and that the prosecution would drop a second count for attempted robbery. *Id.* at 54. Respondent admitted that on May 23, 1981, he unlawfully assaulted Michael Woods with a wooden club. *Id.* at 55.

ing on *United States* v. *Vea-Gonzalez*, 986 F.2d 321, 327, amended on denial of rehearing, 999 F.2d 1326, 1333 (9th Cir. 1993), the court concluded that "the Constitution requires that defendants be given the opportunity to collaterally attack prior convictions that will be used against them at sentencing." App., *infra*, 2a. The court thus held that "the district court erred in declining to consider [respondent's] challenges to the constitutional validity of his prior convictions." App., *infra*, 2a.[3]

4. On August 30, 1993, the government sought rehearing and rehearing en banc, arguing that only fundamental errors equivalent to complete denial of the right to counsel may be raised when a prior conviction is used for purposes of sentencing a defendant under the Guidelines. On October 7, 1993, the court denied the petition. App., *infra*, 7a.

REASONS FOR GRANTING THE PETITION

Neither the Sentencing Guidelines nor the Constitution permits respondent to attack his prior state convictions for the first time at sentencing. Prior to the November 1990 amendment to the Guidelines, Application Note 6 stated that "[c]onvictions which the defendant shows to have been constitutionally invalid may not be counted in the criminal history score." Guidelines § 4A1.2, Application Note 6 (Nov. 1, 1989).[4] On November 1, 1990, however, the Sentencing Commission amended the commentary to Section 4A1.2 in

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[3] The court of appeals also remanded the case because the district court had failed to state its reasons for imposing a 236-month sentence within the sentencing range. App., *infra*, 2a-3a.

[4] Several courts of appeals held that Application Note 6 authorized district courts to consider constitutional challenges to prior convictions used for sentencing. See, *e.g.*, *United States* v. *Carroll*, 932 F.2d 823, 825 (9th Cir. 1991); *United States* v. *Edwards*, 911 F.2d 1031, 1035 (5th Cir. 1990).

two pertinent respects. First, the Commission amended the second sentence of Application Note 6 to state that "sentences resulting from convictions that a defendant shows to have been previously ruled constitutionally invalid are not to be counted." Guidelines § 4A1.2, Application Note 6 (Nov. 1, 1990). Second, the Commission added a background note to Guidelines § 4A1.2 stating that "[t]he Commission leaves for court determination the issue of whether a defendant may collaterally attack at sentencing a prior conviction." Guidelines § 4A1.2, Commentary (Nov. 1, 1990).

The November 1990 amendment makes clear that a defendant is not entitled to attack the constitutionality of a prior conviction for the first time at sentencing; rather, he must show that the prior conviction "ha[s] been previously ruled constitutionally invalid." Guidelines § 4A1.2, Application Note 6 (Nov. 1, 1990). Although the background commentary added by the November 1990 amendment contemplates that a defendant may collaterally attack a prior conviction at sentencing in some circumstances, it cannot reasonably be read to give district courts unlimited discretion to consider constitutional challenges that have not previously been raised. Otherwise, the contemporaneous amendment to Application Note 6 providing for exclusion only of "previously" invalidated convictions would be meaningless. The 1990 commentary is therefore properly understood to mean that courts have authority to entertain collateral attacks on prior convictions at sentencing only when the Constitution so requires. See, *e.g.*, *United States* v. *Elliott*, 992 F.2d 853, 856 (8th Cir. 1993), petition for cert. pending, No. 93-5570; *United States* v. *Roman*, 989 F.2d 1117, 1119 (11th Cir. 1993) (en banc), petition for cert. pending, No. 93-5464.[5]

[5] To be sure, several courts of appeals have held that district courts retain discretion under that commentary to allow collateral attacks on prior convictions for the first time at sentencing. See, *e.g.*, *United States*

Notwithstanding the limited availability of collateral relief under the Guidelines, the Ninth Circuit in *Vea-Gonzales* broadly held that "the Constitution requires that defendants be given the opportunity to collaterally attack prior convictions which will be used against them at sentencing." 999 F.2d at 1333. In our view, the Constitution requires collateral review of prior convictions used for sentencing only when the defendant challenges his prior conviction on grounds of complete denial of counsel or similarly fundamental constitutional error. See *United States* v. *Tucker*, 404 U.S. 443 (1972); *Burgett* v. *Texas*, 389 U.S. 109 (1967). Otherwise, a court may rationally use a prior final conviction to indicate that the defendant is a more serious offender and should receive a stiffer sentence. See *Chapman* v. *United States*, 111 S. Ct. 1919, 1927 (1991) (someone convicted of an offense "is eligible for, and [a] court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual, and so long as the penalty is not

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v. *Brown*, 991 F.2d 1162, 1166 (3d Cir. 1993); *United States* v. *Canales*, 960 F.2d 1311, 1315 (5th Cir. 1992); *United States* v. *Jakobetz*, 955 F.2d 786, 805 (2d Cir.), cert. denied, 113 S. Ct. 104 (1992). On November 1, 1993, the Sentencing Commission amended the commentary to Section 4A1.2, deleting both the second sentence of Application Note 6 and the background note. Instead, the Commission added the following new sentence to Application Note 6:

> With respect to the current sentencing proceeding, this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law (e.g., 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions).

Guidelines § 4A1.2, Application Note 6 (Nov. 1, 1993). See also United States Sentencing Commission, *Guidelines Manual* App. C.339-C.340, amend. 493 (Nov. 1993). The 1993 amendment should resolve any conflict among the circuits on the interpretation of Section 4A1.2.

based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment") (citation omitted).[6]

There is a conflict among the circuits on the question whether and to what extent the Constitution authorizes collateral attacks on prior convictions used for sentencing.[7] This Court recently granted a petition for a writ of certiorari presenting that question. See *Custis* v. *United States*, No. 93-5209. Because this Court in *Custis* will address the same issue presented by this case, this petition should be held for disposition in light of this Court's decision in *Custis*.

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[6] Respondent's claims are based on this Court's decision in *Boykin* v. *Alabama*, 395 U.S. 238 (1969), which requires state courts to place on the record facts showing that a defendant who pleads guilty is aware of certain rights being waived by entering that plea. Even assuming that respondent's claims properly allege *Boykin* violations, allegations of noncompliance with the prophylactic protections established in *Boykin* are not reviewable in a collateral attack on a prior conviction. Cf. *United States* v. *Timmreck*, 441 U.S. 780 (1979) (technical violations of prophylactic plea colloquy provisions of Fed. R. Crim. P. 11 are not cognizable on collateral review); *Halliday* v. *United States*, 394 U.S. 831 (1969).

[7] Compare, *e.g.*, *Vea-Gonzales*, 999 F.2d at 1333 (Constitution requires sentencing courts generally to hear collateral attacks on prior convictions used for sentencing), with *United States* v. *Custis*, 988 F.2d 1355, 1362 (4th Cir. 1993) ("district courts are obliged to hear constitutional challenges to predicate state convictions * * * only when prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant"), cert. granted, No. 93-5209 (Oct. 12, 1993); *United States* v. *Roman*, 989 F.2d 1117, 1120 (11th Cir. 1993) (en banc) (courts must entertain challenges only if previous conviction is "presumptively void"), petition for cert. pending, No. 93-5464; *United States* v. *Isaacs*, No. 92-2129 (1st Cir. June 22, 1993), slip op. 15-16 (same), and *United States* v. *Elliott*, 992 F.2d 853, 856-858 (8th Cir. 1993) (courts must hear collateral attacks on prior convictions only if the alleged constitutional infirmity undermines a conviction's reliability as an indicator of guilt or "erodes the principle" of the case relied on for the underlying claim of error), petition for cert. pending, No. 93-5570.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of the Court's disposition of *Custis* v. *United States*, No. 93-5209.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JANUARY 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-10377
D.C. No. CR-91-00004-REC

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

MITCHELL LEE PRICE, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, Chief Judge, Presiding

Argued and Submitted September 14, 1992
Submission Vacated May 5, 1993
Resubmitted July 14, 1993
San Francisco, California

[Filed July 16, 1993]

MEMORANDUM

Before: SCHROEDER, NORRIS, and BRUNETTI, Circuit Judges.

Appellant Mitchell Lee Price ("Price") pled guilty to armed bank robbery, in violation of 18 U.S.C. § 2113, and was sentenced

to 236 months' imprisonment. Price challenges his sentence on two grounds: first, that the district court erred in not allowing him to challenge the constitutionality of two prior felony convictions, and second, that the district court failed to state its reasons for choosing a sentence within a guidelines range greater than 24 months, as required by 18 U.S.C. § 3553(c). We vacate the sentence and remand.

I

The presentence report classified Price as a Career Offender based on his two prior felony convictions, one for burglary and one for assault with a deadly weapon. Price had pled guilty to both charges. Price moved to strike both prior convictions as constitutionally invalid because his guilty pleas were not voluntary and knowing. The district court denied the motion without reaching the merits; it found that the issue of whether to permit collateral attacks on prior convictions at sentencing was a matter left to its discretion, and it declined to exercise its discretion to entertain Price's collateral attacks.

We recently held in *United States v. Vea-Gonzales*, 986 F.2d 321 (9th Cir. 1993), that the Constitution requires that defendants be given the opportunity to collaterally attack prior convictions that will be used against them at sentencing. *Id.* at 327. Thus, the district court erred in declining to consider Price's challenges to the constitutional validity of his prior convictions. We vacate the sentence and remand for the district court to consider these challenges.

II

To give the district court some guidance on remand, we will consider the merits of Price's second contention. The presentence report determined that the appropriate sentencing range was 210 to specific sentence, and sentenced Price to 236 months' imprisonment.

Because the guideline range exceeded 24 months, the district court was required to "state in open court the reasons for its imposition of the particular sentence, and . . . the reason for imposing a sentence at a particular point within the range." 18 U.S.C. § 3553(c)(1). We have interpreted this statute as requiring the sentencing court to make a statement in open court that expressly considers the seven sentencing factors set forth in 18 U.S.C. § 3553(a). *United States v. Upshaw*, 918 F.2d 789, 793 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1335 (1991).

The district court simply accepted the presentence report's recommendations regarding the overall guidelines range. It never stated why it chose 236 months as the appropriate sentence, either in open court or in the judgment's written "Statement of Reasons." The district court thus failed to satisfy the requirements of 18 U.S.C. § 3553. *See Upshaw*, 918 F.2d at 792 (simply adopting the presentence report's recommendations regarding sentencing category, without explaining reasons for choosing particular sentence in the mid-range, is insufficient). On remand, should the district court once again sentence Price within a guidelines range of more than 24 months, it should state its reasons for doing so in accordance with 18 U.S.C. § 3553.

VACATED and REMANDED

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CR-F-91-004 REC

UNITED STATES OF AMERICA, PLAINTIFF

VS.

MITCHELL LEE PRICE, DEFENDANT

[Filed July 15, 1991]

ORDER

On March 11, 1991 defendant Mitchell Lee Price entered a plea of guilty to a one-count indictment, charging him with armed bank robbery in violation of 18 U.S.C. sections 2113(a) and 2113(d). On April 23, 1991 a presentence report was completed. The report recommended that the defendant be classified as a career offender, pursuant to section 4B1.1 of the Sentencing Guidelines, based upon prior felony convictions for crimes of violence. The probation officer calculated the defendant's offense level as a career offender as level 32, based upon a base offense level of 34 and a two-level reduction for acceptance of responsibility. The defendant's criminal history score amounted to 22, which placed him in a criminal history category of VI. The probation officer recommended 236 months' imprisonment, which fell within the applicable guidelines range of 210 to 262 months.

Defendant's prior felony convictions for crimes of violence are felony pleas to one count of assault with a deadly weapon and

three counts of burglary in the first degree. Defendant plead guilty to assault with a deadly weapon on June 9, 1981 in Kern County Superior Court, Case No. 22467. On February 9, 1984, defendant plead guilty to one count of burglary in the first degree in Case No. 26621 and two counts of burglary in the first degree in Case No. 26668. Defendant moves to strike these prior convictions on the ground that they are constitutionally invalid. Defendant alleges that the pleas were not entered voluntarily and intelligently.

Application Note 6 to section 4A1.2 of the Sentencing Guidelines provides that "sentences resulting from convictions that a defendant shows to have been previously ruled constitutionally invalid are not to be counted." The "previously ruled" language was added by the November 1990 amendments to the Sentencing Guidelines. Prior to the amendment, a defendant could collaterally attack prior convictions at the sentencing stage when faced with sentence enhancement. *United States v. Clawson*, 831 F.2d 909, 914 (9th Cir. 1987), *cert. denied*, 488 U.S. 923 (1988). The issue before the court now is whether the "previously ruled" language means that a defendant may no longer lodge a constitutional challenge against a prior conviction for the first time at the sentencing stage.

Neither party has cited any case law addressing the issue. The court's research has revealed only two cases discussing the change to Note 6. The Second Circuit in *United States v. Arigbodi*, 924 F.2d 462 (2d Cir. 1991), merely refers to the change but offers no guidance in applying the added language. The Ninth Circuit in *United States v. Guthrie*, 931 F.2d 564 (9th Cir. 1991), stated as follows:

> The "previously ruled" language implies that defendants no longer may challenge prior convictions at the sentencing stage. However, a "background" note following the commentary to section 4A1.2 states that "[t]he Commission leaves for *court determination* the issue of whether a defendant may collaterally attack at sentencing a prior convic-

> tion." . . . Because [defendant] was sentenced under old Note 6, this change in wording, whatever its significance, is immaterial to this case.

Id. at 570 n.4 (emphasis in original) (citations omitted).

While the case law does not offer any direction in applying the new language, it is clear that the Commission has left the decision of whether to permit a collateral attack at sentencing to the discretion of the trial court. Accordingly, in light of the addition of the "previously ruled" language to Application Note 6, the court declines to exercise its discretion to entertain the collateral attacks of the constitutional validity of defendant's prior convictions.

ACCORDINGLY, IT IS ORDERED that defendant's Motion to Strike Prior Convictions for Criminal History Score on the Grounds that they are Constitutionally Invalid is denied.

DATED: July 15, 1991

/s/ Robert E. Coyle

ROBERT E. COYLE
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-10377
D.C. No. CR-91-00004-REC

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

VS.

MITCHELL LEE PRICE, DEFENDANT-APPELLANT

[Filed Oct. 7, 1993]

ORDER

Before: SCHROEDER, NORRIS, and BRUNETTI, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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QUESTION PRESENTED

Whether the petitioner has a right under the Due Process Clause to collaterally attack prior state convictions used to enhance his sentence under the Sentencing Guidelines.

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Sentencing Guidelines:

§ 4B1.1 2

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BRIEF FOR MITCHELL LEE PRICE IN OPPOSITION

OPINION BELOW

The memorandum decision of the Court of Appeals (Pet. App., 1a-3a) is unpublished, but the judgment is noted at 999 F.2d 545 (Table). The order of the district court denying respondent's motion to exclude his prior convictions (Pet. App., 4a-6a) is unpublished.

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1993. A petition for rehearing was denied on October 7, 1993. (Pet. App., 7a) The petition for a writ of certiorari was filed on January 3, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

On December 10, 1990, Mr. Price, the respondent, robbed the Wells Fargo Bank in

Bakersfield, California, of $247. (PSR 2, Paragraph 5) On March 11, 1991, he pleaded guilty to the indictment charging him with bank robbery, pursuant to a plea agreement. (CR 11, 10)

Prior to sentencing a presentence report was prepared to assist the district court. In that report it was alleged that the respondent had pleaded guilty to an assault with a deadly weapon charge on June 9, 1981 and to three counts of burglary on February 9, 1984. Both pleas were entered in Kern County, State of California, Superior Court. (ER[1] 33) Based on these convictions the presentence report recommended that the respondent's sentence be enhanced under the United States Sentencing Commission Guidelines section 4B1.1, as a "career offender." (PSR 5, Paragraph 5)

The respondent filed a motion, prior to sentencing, to strike the use of his prior convictions on the grounds that they were constitutionally invalid. (ER 32-39) In the respondent's motion to strike he alleged, in general, his objections to the two prior pleas and requested an evidentiary hearing so that he could provide further evidence as to the invalidity of the pleas pursuant to Ninth Circuit law in *United States v. Carroll*, 932 F.2d 823 (9th Cir. 1991) (ER 3) As to the first prior plea, assault with a deadly weapon, the respondent alleged that the plea was not "knowing and voluntary" and that the respondent wished to present evidence at a hearing that he, in fact, believed he was pleading to a misdemeanor offense. This belief was supported by the state court record that was attached to his motion. (ER 34-36, 53-57) As to the second plea the respondent presented proof that no advisement of his constitutional rights was set forth on the record and requested that he be granted an evidentiary hearing to show the plea was constitutionally invalid. (ER 36-37, 38-39)

The petitioner filed objections to the respondent's motion to strike arguing that 1) the prior

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[1]"ER" refers to the Court of Appeal Excerpts of Record filed by the respondent.

convictions could not now be challenged as no prior ruling that they were unconstitutional had been obtained, and that 2) the respondent had failed to "prove by a preponderance of the evidence that the convictions were unconstitutionally obtained." (ER 44-47) The responded filed a response to the petitioner's opposition reaffirming his request for an evidentiary hearing to meet the second objection of the petitioner. (ER 51)

At sentencing the district court ruled that the November 1, 1990 change in the guideline adding the "'previously ruled ... guage means that a defendant may no longer lodge a constitutional challenge against a prior conviction for the first time at the sentencing stage." (ER 2) Based on this ruling the court did not reach the issue of whether the respondent was entitled to an evidentiary hearing. (ER 66-67) The respondent was thereafter sentenced to a term of imprisonment of 236 months, to be followed by a five-year term of supervised release. (ER 14-16)

The Court of Appeal, relying on its then recent decision in *United States v. Vea-Gonzales*, 986 F.2d 321 (9th Cir. 1993), reversed and remanded the case to the district court to give the respondent an "opportunity to collaterally attack his prior convictions that will be used against [him] at sentencing." (Pet. App. 2a) Thereafter the government's requests for rehearing and rehearing en banc were denied. (Pet. App. 7a)

REASONS FOR DENYING THE PETITION

A. THIS COURT'S PRIOR DECISIONS REQUIRE THAT DEFENDANTS BE GIVEN THE OPPORTUNITY TO COLLATERALLY ATTACK CONSTITUTIONALLY INFIRMED PRIOR CONVICTIONS WHICH WILL BE USED AGAINST THEM AT SENTENCING.

The petitioner does not challenge, wisely so, that the Constitution requires collateral review of prior convictions used for sentencing. They only seek to limit the challenging of prior convictions

to challenges on the "grounds of complete denial of counsel or similarly fundamental constitutional error." (Pet. 7) An analysis of this Court's decisions fails to support the petitioner's interpretation and supports the challenge of any constitutional infirmities in prior convictions.

An analysis of this Court's decisions must begin with the 1967 decision in *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). In that decision the petitioner challenged a prior conviction used against him in state court because he had been denied his right to counsel. The Court held that:

> "To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense (*see Greer v. Beto*, 384 U.S. 269, 86 S.Ct. 1477) is to erode the principle of that case." *Id.* at 115

To prevent further erosion of the petitioner's 'specific federal right', in this case the right to counsel, the Court reversed the state court conviction. The Court established the principle that where a 'specific federal right' is denied in the prior conviction used to support guilt or enhance punishment, the court will not allow the use of the prior conviction to erode that right.

In *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) this court established 'specific federal rights' in the taking of guilty pleas. This Court found a 'specific federal right' in determining that a plea is voluntarily made. The court also noted 'specific federal rights' involved in the waiver that takes place when the plea is entered including the privilege against self incrimination, right to trial by jury, and the right to confront one's accusers. The Court further stated that to avoid collateral proceedings attacking convictions, courts should "conduct an on the record examination of the defendant which should include, inter alia, an attempt to satisfy itself that the defendant understands the nature of the charges, his right to a jury trial, the acts sufficient to

constitute the offenses for which he is charged and the permissible range of sentences." *Boykin*, 395 U.S. at 244 note 7, 89 S.Ct. at 1713 note 7.

In 1972 this court further visited these issues when it decided *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972). In *Tucker* this court held that use of a prior conviction to enhance "a sentence founded at least in part upon misinformation of constitutional magnitude" was error. 404 U.S. at 447, 92 S.Ct. at 592. *Tucker* reaffirmed the rule in *Burgett* that to prevent the erosion of constitutional rights, constitutionally infirmed convictions cannot be considered to support guilt or enhance punishment.

Burgett and *Tucker* require collateral attacks of prior convictions premised on any constitutional infirmity. Allowing such attacks is the only way to assure "that an unconstitutional conviction could not be used again and again to cause still more harm to the person upon whom it was first visited." *United States v. Vea-Gonzales*, 999 F.2d 1326 (9th Cir. 1993)

The respondent's view of the constitutional requirements which limit collateral review of prior convictions on grounds of 'complete denial of counsel or similarly fundamental constitutional error' finds no support in the case law. For example what is a "complete denial of counsel?" Are there varying degrees of the right to counsel? No such concept is present in the case law. Further, what is "fundamental constitutional error?" No case discusses the concept of what is or is not fundamental error and of course the respondent cites none for this proposition.

The only case cited by the respondent is *Chapman v. United States*, __ U.S. __, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991). In the quotation cited by the respondent (App. 7) they should have included the full quotation as follows:

"Every person has a fundamental right to liberty in the sense that the Government

> may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees. [cite omitted] But a person who *has* been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual, [cite omitted] and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment." *Id.* at 1927.

Chapman makes clear that a defendant may not be sentenced on a conviction that is constitutionally infirmed. Only after the lack of constitutional infirmity is established may a court impose the punishment authorized by law.

The petitioner's reliance on *United States v. Timmreck*, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979) and *Halliday v. United States*, 394 U.S. 831, 89 S.Ct. 1498, 23 L.Ed.2d 16 (1969) are similarly misplaced. In both *Timmreck* and *Halliday* a constitutional claim against the prior conviction was not made. Therefore, no collateral attack was allowed.

In *Timmreck* the court held that "such collateral relief is not available when all that is shown is a failure to comply with the formal requirements of [Rule 11]." *Supra* at 785. The challenge in *Timmreck* was to a collateral consequence of the plea, i.e., that the defendant was not informed of the three-year minimum mandatory parole term, wherein he did not argue that he was, in fact, unaware of the term or that if he had known of the term he would not have plead guilty. Such a challenge does not involve constitutional infirmity but merely a technical violation of Rule 11 and is not allowed collaterally.

Similarly, in *Halliday* the defendant's claim was solely a technical violation of Rule 11 and therefore the court would not allow a challenge to the prior conviction on that ground prior to the Court's decision in *McCarty v. United States*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969) In both *Halliday* and *McCarty* the Court "took care to note that the holding was based solely on the

application of Rule 11 and not upon constitutional grounds." *Halliday, Supra* at 832.

The principles set forth in *Burgett* and *Tucker* are still valid today and firmly establish that prior convictions may be challenged collaterally when constitutional infirmity is established. The constitutional violations that may occur in a guilty plea are set forth in *Boykin* and a violation of any of those rights may result in collateral attack of the prior conviction and result in the court not considering them to support guilt or to enhance punishment.

B. THE RESPONDENT SHOULD HAVE BEEN GIVEN AN EVIDENTIARY HEARING ON HIS MOTION TO STRIKE THE PRIOR CONVICTION AND UNTIL HE HAS A FULL HEARING ON WHAT CONSTITUTIONAL INFIRMITIES WERE PRESENT IN HIS PRIOR CONVICTIONS THIS COURT SHOULD DENY THE PETITION.

Because the district court held that the United Sentencing Commission Guidelines gave him discretion to permit a collateral attack and he declined to exercise that discretion the respondent was never given a change to fully present his constitutional challenges at an evidentiary hearing. Without a hearing to set forth his challenges this Court would now be unable to decide whether the respondent presented a constitutional infirmity to the convictions.

When the respondent made his motion to challenge the convictions, he specifically requested an evidentiary hearing to present his claims. Under Ninth Circuit law the respondent is entitled to establish the constitutional invalidity of the prior conviction through testimony at an evidentiary hearing. *United States v. Carroll*, 932 F.2d 823, 825 (9th Cir. 1991) The respondent in his motion specifically made a request for an evidentiary hearing to present evidence of the constitutional invalidity of the convictions.

The respondent in his motion set forth that his plea to the assault was constitutionally infirmed due to it not being knowing and voluntary because he was under the belief that he was

pleading to a misdemeanor offense. The transcript of the plea supported that conclusion. His moving papers established that a constitutional claim was alleged, i.e., that the plea was not knowing and voluntary. The respondent should be allowed to present evidence of his knowledge of the effect of his plea and whether he would have pled guilty if he had known the conviction was for a felony. The respondent should be allowed to further articulate his claim by presenting testimony before this court rules on the merits of the government's petition for certiorari.

As to the burglary convictions the respondent established that no record existed as to what occurred at the plea. He was entitled to present evidence at the hearing to show what constitutional rights were violated. This court would be premature in denying respondent's claims without a full hearing before the district court.

Therefore, until the respondent is allowed an evidentiary hearing to make his claims this court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied because the respondent is entitled to challenge his prior convictions for any constitutional infirmities and he should be allowed an evidentiary hearing to establish what constitutional infirmities he is alleging.

Respectfully submitted.

ARTHUR W. RUTHENBECK
Federal Defender, Eastern District of California

ROBERT W. RAINWATER
Assistant Federal Defender

APRIL 1994

CERTIFICATE OF SERVICE

UNITED STATES OF AMERICA, Petitioner, v. MITCHELL LEE PRICE, Respondent.	No. 93-1079

The undersigned hereby certifies that he/she is an employee in the office of the Federal Defender for the Eastern District of California and is a person of such age and discretion as to be competent to serve papers. On March 31, 1994, I personally served a copy of the attached:

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelop and contents in the United States mail at Fresno, California, as follows:

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530

DATED: March 31, 1994

Margaret S. Camacho